United States Court of Appeals

for the Second Circuit

REPLY BRIEF

75-2079

B
P/s

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

UNITED STATES OF AMERICA ex rel :
JOSEPH EDWARD FRANCIS LUNZ,
:
Petitioner-Appellant, No. 75-2079
:
- against -
:
J. E. LaVALLEE, SUPERINTENDENT
CLINTON CORRECTIONAL FACILITY :
DANNEMORA, NEW YORK,
:
Respondent-Appellee.
:
- -X

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REPLY BRIEF

This Reply Brief is submitted in further support of Petitioner's appeal from the Order below denying his application for a writ of habeas corpus.

Nothing that Respondent has submitted conflicts with Petitioner's argument that the minutes of the Sentencing Hearing on their face unequivocally demonstrate that Petitioner did not understand the consequences of his plea and that Petitioner had no opportunity to speak on his own behalf. Respondent, confronted with those minutes, invokes

case law which is simply not on point. To Petitioner's argument that he never received effective assistance from his admittedly experienced attorneys -- whose credentials are not in dispute -- Respondent dwells on these credentials rather than upon what the attorneys did or did not do for Petitioner. This Reply Brief will address itself to these points.

I. THE DECEPTION WHICH PROMPTED PETITIONER'S CONFESSION WAS NOT CURED BY HIS PLEA OF GUILTY

In response to Petitioner's claim that the plea in this case was based upon a misunderstanding of the consequences, Respondent invokes McMann v. Richardson, 397 U.S. 759 (1970), and its progeny. The Richardson Court held that it is only where a defendant is not competently counseled or "where the circumstances that coerced the confession have abiding impact and also taint the plea" that relief is warranted. Id., 767. The Richardson Court reasoned that in the case of a coerced confession, capable counsel for an accused would ask himself whether a trier of fact would find the confession voluntary and admissible, and if the answer is not, would not allow his client to plead guilty. Id., 769-770.

Petitioner herein has claimed -- and there has been no testimony to refute him -- that he was told by Detective Fitzsimmons, with another detective present, that Petitioner would not be "prosecuted" and that by that promise Petitioner understood that he would not be sent to jail for this charge. (CN. at 8-9, 12, 13.) Under the very rule of Richardson, Petitioner is entitled to a hearing on his claim. The confession here was not elicited by physical force, but by a deception which continued until the day of sentence, when Petitioner at last realized that he would be sentenced on the charge of second-degree murder and not on the stolen property and grand larceny charges for which he had been originally indicted.

Thus, Respondent's reliance on Richardson is misplaced. The minutes of the Sentencing Hearing demonstrates that Petitioner was under the belief that he would be sentenced not in Queens, but in Manhattan, where he was indicted on the grand larceny and stolen property charges, yet the sentencing judge did not stop to inquire as to Petitioner's understanding or the basis for it. The judge had no interest in Petitioner's astonishment, registered only a few moments after the proceeding began. Every inquiry made

by Petitioner to find out what had happened was met by the judge with singleminded devotion to pronouncing sentence. Petitioner's inquiry were not more than one would expect from a youth with serious psychiatric disturbances and limited education, but his confusion and outrage are painfully clear from the record. Yet, Petitioner was told to "just keep still" and the sentencing judge's response to his every question was an attempt to pronounce sentence before Petitioner could again ask what was going on.

This Court itself has suggested, in United States v. Lombardozzi, 467 F.2d 160 (2d Cir. 1972), cert. denied, U.S. (1973), (relying on Giglio v. United States, 405 U.S. 150 [1972] and Santobello v. New York, 404 U.S. 257 [1971]), that a plea in reliance on a promise, even an unauthorized promise, by anyone on the prosecutorial team -- as detective Fitzsimmons was here -- is grounds for a motion under 28 U.S.C. 2255 for an order vacating sentence. Santobello, decided after the Richardson case, is persuasive here. There, the Court held that a plea made in reliance on a prosecutor's broken promise could be withdrawn if not specifically enforced.

So it is here. Petitioner has testified that Detective Fitzsimmons repeatedly informed him that he would

not be sent to jail for this crime if he confessed, and Petitioner did so. That confession prompted Petitioner's co-defendant to confess and apparently formed the basis for the indictment. Petitioner's guilty plea was entered with the promise in mind, and it was not until the day of sentencing that Petitioner realized that the outcome would be exactly the opposite of what he had been told -- that he would be sentenced on the second-degree murder count, and not on the larceny counts. Under Santobello his plea cannot be considered voluntary.

II. THE RECORD DEMONSTRATES THAT PETITIONER DID NOT RECEIVE ADEQUATE ASSISTANCE OF COUNSEL

The record before this Court demonstrates that Petitioner's counsel never explained to Petitioner the nature or consequences of the prosecutorial process, never obtained the full psychiatric file on Petitioner -- which included (CN. 18-20) a psychiatrist's notes from a recent interview stating that Petitioner was unable to stand trial -- and never obtained a ruling on the voluntariness of Petitioner's confession, which is in serious question both because of defendant's unstable psychiatric condition and because of the promise made to him. The record also demon-

strates that counsel never once visited Petitioner prior to the hearing as to his ability to stand trial on April 2, 1965. In response to all this, Respondent merely invokes the impressive credentials of Petitioner's attorneys and dwells upon their many years of experience, and states that "the lawyers had to balance the merits of an uncertain defense against the danger of capital punishment and under these circumstances a negotiated plea could not be deemed an abandonment of appellant's interests.*

Respondent's argument simply misses the point. It is not the years of experience which these lawyers had at the bar which is at issue here; it is their improvident

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* Petitioner does not claim that his plea was the product of any fear of execution instilled in him by counsel; to set the record straight, while Petitioner's sister did mention the death penalty, Petitioner's counsel never mentioned the risk of the death penalty in their discussions with Petitioner. (CN. 52-53.) It was not the fear of the death penalty which motivated the plea here, but Petitioner's belief that he would be sentenced in any event only on the stolen property and larceny charges -- a misapprehension which his counsel apparently did nothing to correct. This misapprehension, combined with Petitioner's fear for the child his sister was carrying, compelled him to enter his plea of guilty.

urging upon Petitioner to plead guilty, without full investigation into his psychiatric history, the circumstances underlying his confession, and without a sufficient explanation of the prosecutorial process to enable Petitioner to understand the consequences of his plea.

III. PETITIONER WAS AFFIRMATIVELY DENIED AN OPPORTUNITY TO SPEAK ALTHOUGH HE ATTEMPTED TO DO SO

Both Respondent and the court below dismissed Petitioner's claim that he was affirmatively denied the right to speak at his sentencing, as the minutes themselves prove. This dismissal was upon the authority of Hill v. United States, 368 U.S. 424 (1962).

While Petitioner questions the applicability of Hill to a habeas petition brought by a state prisoner (see Main Brief at 15)*, even if Hill applied, by its very

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* As to state cases, it is clear that the denial of Petitioner's right to speak is not covered by the preliminary remarks his attorney made here, and, in fact, is not cured as a generaly matter by the fact that the attorney has spoken, where defendant has indicated his desire to speak. Indeed, the modern practice is to afford a defendant an opportunity for a personal statement even though he does not assert "that he had anything to say or that he would have addressed the court at all." People v. Mc Clain, 35 N.Y.2d 483, 491, 364 N.Y.S. 143, 148 (1974).

words its holding does not extend to this case, which involves an affirmative denial of an opportunity to speak:

> "It is to be noted that we are not dealing here with a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed. Nor is it suggested that in imposing the sentence the District Judge was either misinformed or uninformed as to any relevant circumstances. Indeed, there is no claim that the defendant would have had anything at all to say if he had been formally invited to speak." Id. at 429 (emphasis added).

This Court has noted the limited holding of Hill in United States ex rel. Sabella v. Follette, 432 F.2d 572, 576 (2d Cir. 1970) stating: "[T]he Court in Hill left open cases where defendant was affirmatively denied an opportunity to speak." The denial of the right to affirmatively speak should now be cured by giving defendant the opportunity lost to him.

CONCLUSION

For reasons stated herein and in Petitioner's Main Brief, the findings of the District court and its Order denying Petitioner's application should be reversed with a direction for the writ of habeas corpus to issue. In the alternative, the substantial questions raised herein should be remanded to the District Court for a full hearing thereon,

or with direction to issue the writ in the event Petitioner is not timely resentenced.

Dated: New York, New York
August 11, 1975

Respectfully submitted,

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